IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

Case No. _____

ROSENELL SUSI, MAE DIANA,
Petitioners,

vs.

STATE OF OHIO,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

THOMAS M. TYACK
536 South High Street
Columbus, Ohio 43215
Member of the Bar of the
United States Supreme Court
Counsel for Petitioners

MIDWEST LAW PRINTERS AND PUBLISHERS, INC., Columbus, Ohio 43216

INDEX

	Page
OPINION BELOW	1
JURISDICTION	1
QUESTIONS PRESENTED	2
STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE WRIT	3
CONCLUSION	4
APPENDIX	
(A) JUDGMENT ENTRY IN THE SUPREME COURT OF OHIO	5
(B) OPINION, SUPREME COURT OF OHIO	7
(C) JUDGMENT ENTRY, COURT OF APPEALS FOR FRANKLIN COUNTY, OHIO	11
(D) OPINION, COURT OF APPEALS OF FRANKLIN COUNTY, OHIO	12
(E) STATUTORY AND CONSTITUTIONAL PROVISION INVOLVED	
1) Fifth Amendment to the Constitution of the United States	14
2) §2915.01, Ohio Revised Code	14
3) §2915.111, Ohio Revised Code	14

CITATIONS

CASES

Ashe v. Swenson, 397 U.S. 436 (1970) 3

Benton v. Maryland, 395 U.S. 784 (1969) 3

Waller v. Florida, 397 U.S. 387 (1970) 3

STATUTES & CONSTITUTIONAL PROVISIONS

Amendment 5, United States Constitution 14

Section 2915.01, Ohio Revised Code (Page, 1953) 14

Section 2915.111, Ohio Revised Code (Page, 1953) 14

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

Case No. _____

ROSENELL SUSI, MAE DIANA,
Petitioners,

vs.

STATE OF OHIO,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the Supreme Court of Ohio in this action is reported as *State ex. rel. Susi v. Flowers*, 42 Ohio St. 2d 11 (1975). The only other opinion, *State ex rel. Susi, et al. v. Flowers*, Case #74AP-140 (Franklin County Ct. App., 1974), is presently unreported.

GROUNDS FOR JURISDICTION

Judgment was entered in this action upon July 2, 1975. No rehearing was sought. Jurisdiction is granted by 28 U.S.C.A. §1257(3).

QUESTIONS OF LAW PRESENTED

Does the Double Jeopardy Clause of the Fifth Amendment as applied to the states by the Fourteenth Amendment bar a second criminal prosecution arising out of the same facts and evidence presented at an earlier trial at which the same defendants were found guilty?

CONSTITUTIONAL & STATUTORY PROVISIONS INVOLVED

The following provisions are before the Court

1) The Fifth Amendment to the Constitution of the United States
2) §2915.01, Ohio Rev. Code (Page, 1953) at Title 29, page 127
3) §2915.111, Ohio Rev. Code (Page, 1953) at 1972 Supplement to Title 29, page 49.

STATEMENT OF THE CASE

On August 31, 1973, officers from Columbus, Ohio Police Department, arrested petitioners Rosenell Susi and Mae Diana and charged them with violations of Ohio Rev. Code §§2915.01 and 2915.111, (Page, 1953), which were "permitting a room to be used for gambling" and "possession of 'numbers game' ticket" respectively. The possession of numbers charge was later amended to possession of numbers, second offense. This latter charge is the foundation for the present petition.

On March 6, 1972, petitioners were tried and convicted upon the "keeping a room" charge and found guilty in the Municipal Court of Franklin County, Ohio.

On March 8, 1972, petitioners filed a motion to dismiss the charge of possession of numbers pending in the

Court of Common Pleas for Franklin County, Ohio, as violative of double jeopardy. This motion was overruled. Subsequently, writs of mandamus and prohibition on a double jeopardy theory were sought and denied. A review of the latter writ is sought here.

The State of Ohio has stipulated throughout that the precise same facts and evidence are involved in both prosecutions.

REASONS FOR GRANTING THE WRIT

In *Benton v. Maryland,* 395 U.S. 784 (1969) the Court declared the double jeopardy provisions of the Fifth Amendment applicable to the states. Certain guidelines for the application of those provisions were later set forth in *Waller v. Florida,* 397 U.S. 387 (1970) and *Ashe v. Swenson,* 397 U.S. 436 (1970). The present action offers this Court the opportunity to give further guidance as to the applicability of the Double Jeopardy Clause in a situation which involves multiple prosecutions in series based upon the "same facts . . . and . . . evidence," as the State of Ohio has stipulated.

Petitioners submit that *Waller v. Florida, supra,* should in fact, be determinative of this case, since the question of multiple sovereignties is there discussed. However, *Waller* has been restricted to its facts by the Ohio Courts.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Supreme Court of Ohio.

Respectfully submitted,

TYACK, SCOTT & COLLEY

By Thomas M. Tyack

THOMAS M. TYACK
Attorneys for Petitioners
536 South High Street
Columbus, Ohio 43215
221-1341 (614)

CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of September, 1975, three copies of the Petition for Writ of Certiorari were personally delivered to the office of George C. Smith, Prosecuting Attorney, Hall of Justice, 369 South High Street, Columbus, Ohio. I further certify that all parties required to be served have been served.

TYACK, SCOTT & COLLEY

By Thomas M. Tyack

THOMAS M. TYACK
Attorneys for Petitioners
536 South High Street
Columbus, Ohio 43215
221-1341 (614)

APPENDIX "A"

THE SUPREME COURT OF THE STATE OF OHIO
1975 TERM
To wit: July 2, 1975

No. 74-892

APPEAL FROM THE COURT OF APPEALS
for FRANKLIN County

THE STATE OF OHIO,
City of Columbus.
[STATE OF OHIO, EX REL.]
ROSENELL SUSI ET AL.,
Appellants,
vs.
JAY FLOWERS, JUDGE,
Appellee.

This cause, here on appeal from the Court of Appeals for Franklin County, was heard in the manner prescribed by law. On consideration thereof, the judgment of the Court of Appeals is affirmed; for the reasons set forth in the opinion rendered herein, and it appearing that there were reasonable grounds for this appeal, it is ordered that no penalty be assessed herein.

It is further ordered that the appellee recover from the appellant its costs herein expended; that a mandate be sent to the Court of Appeals to carry this judgment into execution; and that a copy of this entry be certified

to the Clerk of the Court of Appeals for FRANKLIN Couny for entry.

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court

this ____ day of _____, 19____

_____Clerk

_____Deputy

APPENDIX "B"

DECISION OF THE SUPREME COURT OF OHIO

On August 31, 1971, appellants, Rosenell Susi and Mae Diana, were arrested and charged with permitting a room to be used for gambling, a misdemeanor, in violation of R. C. 2915.01, and possession of numbers game tickets, a felony, in violation of R. C. 2915.111. On November 26, 1971, the felony charge was amended to possession of numbers game tickets, second offense.

On March 6, 1972, the appellants were tried and convicted on the misdemeanor charge in the Franklin County Municipal Court. Subsequently, they were indicted for the violation of R. C. 2915.111, which charge is presently pending in the Court of Common Pleas of Franklin County. (No. 72 CR-03-372.) On August 16, 1972, the Court of Common Pleas overruled appellants' motion to dismiss the felony charge. On November 27, 1973, appellants' complaint in the Court of Appeals for a writ of habeas corpus was dismissed. *In re Susi* (1973), 83 Ohio App. 2d 73.

Appellants, in the instant action, sought a writ of prohibition in the Court of Appeals, ordering the judge of the Court of Common Pleas to exercise no further jurisdiction as to the felony indictment pending before him. The Court of Appeals dismissed the complaint.

The cause is now before this court upon an appeal as of right.

Messrs. Tyack, Scott & Colley and *Mr. Thomas M. Tyack*, for appellants.

Mr. George C. Smith, prosecuting attorney, and *Mr. David F. Graeff*, for appellee.

Per Curiam. Appellants assert that their trial on the pending charge is barred by the double jeopardy clauses

of the Ohio and federal constitutions, citing *Ashe v. Swenson* (1970), 397 U.S. 436, and *Owens v. Campbell* (1971), 27 Ohio St. 2d 264.

In *Ashe,* the petitioner and three others were arrested for robbing, and stealing a car from, a group of six poker players. Each defendant was charged with seven separate offenses—the armed robbery of each of the six poker players, and the theft of the car.

The petitioner was brought to trial on a charge of robbing Donald Knight, one of the participants in the poker game, and acquitted. Subsequently, he was tried for robbing another participant in the poker game, a man named Roberts, and convicted.

Upon appeal from the denial of a writ of habeas corpus, the United States Supreme Court reversed the petitioner's conviction, holding that the doctrine of collateral estoppel is part of the Fifth Amendment's guarantee against double jeopardy. At page 446, the court stated:

"The question is not whether Missouri could validly charge the petitioner with six separate offenses for the robbery of the six poker players. It is not whether he could have received a total of six punishments if he had been convicted in a single trial of robbing the six victims. It is simply whether, after a jury had determined by its verdict that the petitioner was not one of the robbers, the state could constitutionally hale him before a new jury to litigate that issue again."

In a concurring opinion, Mr. Justice Brennan, joined by Justices Douglas and Marshall, expressed his view that "the double jeopardy clause requires the prosecution, except in most limited circumstances, to join at one trial all the charges against a defendant that grow out of a single criminal act, occurrence, episode or transaction." *Ashe,* at page 453.

In *Owens,* the appellant therein was indicted for breaking and entering an inhabited dwelling in the night season, assault with a dangerous weapon, and rape. Although the uncontradicted testimony of the victims was that all three offenses had been committed in rapid succession by the same person, the state elected to try the appellant on the breaking and entering charge first. After appellant's acquittal, this court, relying upon *Ashe v. Swenson,* ordered the remaining indictments dismissed.

Neither *Ashe* nor *Owens* supports the position taken by the appellants herein, for two reasons.

First, the doctrine of collateral estoppel is not applicable to this case. Collateral estoppel provides that one who has been adjudged not guilty of a criminal charge may not be tried thereafter upon a separate charge arising out of the same event or occurrence. In the present case, the appellants were not acquitted in the initial trial, but convicted.

Second, neither the United States Supreme Court, nor this court, has determined the so-called same transaction test, enunciated by Justice Brennan in his concurring opinion in *Ashe,* to be an essential Fifth Amendment guarantee. See Justice Harlan's concurring opinion, at page 448 of *Ashe, supra; State v. Ferguson* (1964), 175 Ohio St. 390, 394. We adhere to the mandate of the United States Supreme Court in this regard.

To support the issuance of a writ of prohibition, appellants must show that the court or officer against whom the writ is sought is about to exercise judicial or quasi-judicial power; that the exercise of such power is unauthorized by law; and that refusal of the writ will result in injury for which there is no other adequate remedy in the ordinary course of the law. *State, ex rel. McKee v. Cooper* (1974), 40 Ohio St. 2d 65; *State, ex rel. Lehmann, v. Cmich* (1970), 23 Ohio St. 2d 11.

Upon the instant record, appellants are not entitled to the extraordinary writ of prohibition, and the judgment of the Court of Appeals, dismissing the complaint, is affirmed.

Judgment affimed.

O'NEILL, C. J., HERBERT, CORRIGAN, STERN, CELEBREZZE, W. BROWN and P. BROWN, JJ., concur.

APPENDIX "C"

IN THE COURT OF APPEALS OF FRANKLIN COUNTY, OHIO

No. 74AP-140

ROSENELL SUSI and MAE DIANA,
Relators,

v.

THE HONORABLE JAY FLOWERS,
Judge of the Court of Common Pleas,
Franklin County, Ohio,
Respondent.

JOURNAL ENTRY OF JUDGMENT

For the reasons stated in the decision of this court rendered herein on July 30, 1974, it is the judgment and order of this court that respondent's motion to dismiss is sustained and the complaint is dismissed.

ROBERT S. HOLMES
ALBA L. WHITESIDE
ARCHER E. REILLY
Judges

APPENDIX "D"

IN THE COURT OF APPEALS
OF FRANKLIN COUNTY, OHIO

No. 74AP-140

ROSENELL SUSI and MAE DIANA,
Relators,

v.

THE HONORABLE JAY FLOWERS,
Judge of the Court of Common Pleas,
Franklin County, Ohio,
Respondent.

DECISION

Rendered on July 30, 1974

TYACK, SCOTT & COLLEY
MR. THOMAS M. TYACK
536 South High Street
Columbus, Ohio
For Relators

MR. GEORGE C. SMITH
Prosecuting Attorney

MR. WILLIAM B. SHIMP and
MR. DAVID J. GRAEFF
Assistants

Franklin County Hall of Justice,
Columbus, Ohio
For Respondent

Per curiam.

No. 74AP-140

This matter comes before this court by way of the respondent's motion to dismiss upon the basis that the relators' complaint in this original action in prohibition does not state a claim upon which relief can be granted, and upon the merits.

The issue presented in this case was previously decided by this court in the unreported decision rendered in *In the Matter of the Complaint for a Writ of Habeas Corpus for Rosenell Susi and Mae Diana,* No. 73AP-384, Court of Appeals for Franklin County, November 27, 1973 (1973 Decisions, page 3039). The issue presented was discussed at pages 3041 and 3042 of said decision, and we found that collateral estoppel could not apply.

The complaint fails to state a cause of action in prohibition. *State, ex rel. Vance, v. Glasser* (1974), 38 Ohio St. 2d 49. The complaint does not set forth a claim that relators are being charged a second time for the identical offense but, rather, another offense arising out of the same transaction. Thus, double jeopardy is not involved. Collateral estoppel does not apply because there is no allegation that relators were found not guilty upon the original trial. The memorandum attached to the complaint clearly indicates that the issues here are the identical issues raised in case No. 73AP-384, which relators now attempt to litigate in prohibition rather than habeas corpus.

Accordingly, the motion to dismiss must be sustained, and, even though the matter be considered on the merits, the writ must be denied.

HOLMES, WHITESIDE and REILLY, JJ., concur.

APPENDIX "E"

FIFTH AMENDMENT, CONSTITUTION OF THE UNITED STATES

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Section 2915.01, Ohio Revised Code (Page, 1953) at Title 29, p. 127.

No person shall keep a room, building, arbor, booth, shed, tenement, canalboat, or other watercraft, to be used or occupied for gambling, or knowingly permit it to be used or occupied, or being the owner thereof rent it to be so used or occupied. An owner of such building, tenement, or watercraft knowing that a device is used or kept therein for gambling, who does not forthwith make complaint against the person so using or keeping it has knowingly permitted it to be used and occupied for such purpose.

Section 2915.111, Ohio Revised Code (Page, 1953) at 1972 Supp. to Title 29, p. 49.

No person shall own, possess, have on or about his person, have in his custody, or have under his control a

ticket, order, or device for or representing a number of shares or an interest in a scheme of chance known as "policy", "numbers game", "clearing house", or by words or terms of similar import, located in or to be drawn, paid or carried on within or without this state.

Supreme Court, U.S.
FILED
NOV 3
MICHAEL RODAK, JR.

IN THE

Supreme Court of the United States

OCTOBER TERM 1975

No. 75-495

ROSENELL SUSI, MAE DIANA,
Petitioners

v.

STATE OF OHIO,
Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

BRIEF FOR RESPONDENT IN OPPOSITION

GEORGE C. SMITH
Prosecuting Attorney
Franklin County, Ohio
Hall of Justice
369 South High Street
Columbus, Ohio 43215
(614) 462-3555

ALAN C. TRAVIS
Assistant Prosecuting Attorney
Counsel for Respondent

MIDWEST LAW PRINTERS AND PUBLISHERS, INC., Columbus, Ohio 43216

INDEX

	Page
Opinions Below	1
Jurisdiction	1
Question of Law Presented	1
Statement of the Case	1
Argument	2
WHERE ACCUSED IS CHARGED WITH TWO DISTINCT CRIMINAL OFFENSES, (A MISDEMEANOR AND A FELONY), AND IN A TRIAL OF THE MISDEMEANOR CHARGE WITHOUT THE FELONY, ACCUSED IS FOUND GUILTY OF THE MISDEMEANOR, DOES THE DOUBLE JEOPARDY CLAUSE OF THE FIFTH AMENDMENT BAR PROSECUTION OF THE FELONY, WHERE THE ARREST AND FACTUAL PATTERN ARISE OUT OF THE SAME TRANSACTION OR OCCURRENCE.	
Conclusion	3
Certificate of Service	3
Appendix "A"	5
Decision of the Court of Appeals, Franklin County, Ohio, *In Re Susi*, No. 73AP-384.	

CITATIONS

Ashe v. *Swenson*, 397 U. S. 436 (1970)	1
State v. *Ferguson*, 175 Ohio St. 390 (1964)	2
Waller v. *Florida*, 397 U. S. 387 (1970)	2
STATUTES	
Section 2915.01, Ohio Revised Code	1
Section 2915.111, Ohio Revised Code	1

IN THE

Supreme Court of the United States

OCTOBER TERM 1975

No. 75-495

ROSENELL SUSI, MAE DIANA,
Petitioners

v.

STATE OF OHIO,
Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

OPINIONS BELOW

In addition to the opinions set forth in the petition, respondent adds *In Re Susi*, 38 Ohio App. 2d 73 (1973), and attaches as Appendix A.

JURISDICTION

The jurisdictional requisites are adequately set forth in the petition.

QUESTION OF LAW PRESENTED

WHERE ACCUSED IS CHARGED WITH TWO DISTINCT CRIMINAL OFFENSES, (A MISDEMEANOR AND A FELONY), AND IN A TRIAL OF THE MISDEMEANOR CHARGE WITHOUT

THE FELONY, ACCUSED IS FOUND GUILTY OF THE MISDEMEANOR, DOES THE DOUBLE JEOPARDY CLAUSE OF THE FIFTH AMENDMENT BAR PROSECUTION OF THE FELONY, WHERE THE ARREST AND FACTUAL PATTERN ARISE OUT OF THE SAME TRANSACTION OR OCCURRENCE.

STATEMENT OF THE CASE

The statement of the case is adequately set forth in the petition.

ARGUMENT

WHERE ACCUSED IS CHARGED WITH TWO DISTINCT CRIMINAL OFFENSES, (A MISDEMEANOR AND A FELONY), AND IN A TRIAL OF THE MISDEMEANOR CHARGE WITHOUT THE FELONY, ACCUSED IS FOUND GUILTY OF THE MISDEMEANOR, DOES THE DOUBLE JEOPARDY CLAUSE OF THE FIFTH AMENDMENT BAR PROSECUTION OF THE FELONY, WHERE THE ARREST AND FACTUAL PATTERN ARISE OUT OF THE SAME TRANSACTION OR OCCURRENCE.

The Supreme Court of Ohio properly notes in their opinion in the present case that the doctrine enunciated in *Ashe* v. *Swenson*, 397 U. S. 436 (1970) only comes into effect when the accused is found not guilty in the first prosecution.

> "First, the doctrine of collateral estoppel is not applicable to this case. Collateral estoppel provides that one who has been adjudged not guilty of a criminal charge may not be tried thereafter upon a separate charge arising out of the same event or occurrence. In the present case, the appellants were not acquitted in the initial trial, but convicted."
> (Petitioners' Brief, page 9)

Petitioners here have been charged with two distinct offenses: (1) permitting a room to be used for gambling, a misdemeanor in violation of Revised Code 2915.01, and (2) possession of numbers game tickets, a felony, in violation of Revised Code 2915.111. They were convicted of the misdemeanor charge in the Municipal Court of Franklin County. The Double Jeopardy Clause, however, does not bar their prosecution for the felony charge before the Franklin County Court of Common Pleas when the latter is a distinct criminal offense.

With respect to the Double Jeopardy claim by petitioners, the Supreme Court of Ohio notes in their opinion:

> "Second, neither the United States Supreme Court, nor this court, has determined the so-called same transaction test, enunciated by Justice Brennan in his concurring opinion in *Ashe*, to be an essential Fifth Amendment guarantee. See Justice Harlan's concurring opinion, at page 448 of *Ashe*, *supra*; *State* v. *Ferguson* (1964), 175 Ohio St. 390, 394. We adhere to the mandate of the United States Supreme Court in this regard."
> (Petitioners' Brief, page 9)

Finally, petitioners rely on *Waller* v. *Florida*, 397 U. S. 387 (1970) in respect to the multiple prosecution issue. It is respectfully noted that the facts in *Waller* involved prosecution and conviction of the identical offense first in a municipal court followed by conviction in a state court.

Waller held that a conviction in the municipal court barred prosecution in a state court for the identical offense, at page 395.

CONCLUSION

Respondent respectfully notes that because petitioners are charged with two distinct criminal offenses, the Double Jeopardy Clause of the Fifth Amendment has not been offended where petitioners have been convicted of the misdemeanor charge, and prosecution is continuing on the felony.

It is, therefore, submitted that the within cause presents no question which warrants further review by this Court and that the petition for a writ of Certiorari should be denied.

Respectfully submitted,

GEORGE C. SMITH
Prosecuting Attorney
Franklin County, Ohio
Hall of Justice
369 South High Street
Columbus, Ohio 43215
(614) 462-3555

ALAN C. TRAVIS
Assistant Prosecuting Attorney
Attorneys for the State of Ohio

CERTIFICATE OF SERVICE

I, Alan C. Travis, counsel for Respondent herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the _____ day of October, 1975, I served three copies of the foregoing printed Brief in Opposition to Petition for Writ of Certiorari, be maling a copy in a duly addressed envelope, with first class postage prepaid to Mr. Thomas M. Tyack, 536 South High Street, Columbus, Ohio 43215. I further certify that all parties required to be served have been served.

ALAN C. TRAVIS
Counsel for Respondent

APPENDIX "A"

IN THE COURT OF APPEALS OF FRANKLIN COUNTY, OHIO

NO. 73AP-384

In the Matter of the Complaint For a Writ of Habeas Corpus For Rosenell Susi and Mae Diana.

DECISION

Rendered on November 27, 1973

TYACK, SCOTT & COLLEY,
MR. THOMAS M. TYACK
536 South High Street
Columbus, Ohio
For Petitioners Rosenell Susi and Mae Diana

MR. GEORGE C. SMITH
Prosecuting Attorney
MR. MILES C. DURFEY
Assistant Prosecuting Attorney
Franklin County Hall of Justice
369 South High Street
Columbus, Ohio
For Respondent George C. Smith

PER CURIAM.

This original action in habeas corpus is before this court upon the motion of respondent, George C. Smith, Prosecuting Attorney, to dismiss the complaint upon the grounds that it fails to state a cause of action in habeas corpus. Respondent also contends that he is not a proper party from whom the petitioners should seek relief.

Petitioners rely upon *Owens v. Campbell* (1971), 27 Ohio St. 2d 264, in support of their contention that they have properly brought this action. The syllabus of that case reads as follows:

> "The extraordinary original jurisdiction granted to an Ohio appellate court may be invoked to adjudicate the right of an accused to the benefit of the doctrine of collateral estoppel, made applicable to the state as being within the federal constitutional right against double jeopardy by *Ashe v. Swenson*, 397 U. S. 436."

While *Owens* was brought in habeas corpus, the Supreme Court made no reference thereto in the syllabus but rather referred to "the extraordinary original jurisdiction" of the Court of Appeals. This is significant in light of the statement in the opinion by Justice Schneider at page 267-268 that:

> "Rather than affirm the trial court on the ground of lack of a proper nominal party or *for failure of appellant to label correctly his invocation of the Court of Appeals' proper original jurisdiction*, we reverse the judgment entered by it * * *." (Emphasis added.)

It is not clear as to which of the five original writs the Supreme Court felt was proper. It may well have been prohibition inasmuch as Justice Schneider also observed at page 267, "* * * we do not fear that any officer or judge would consider himself not bound by the adjudication by reason of his absence or a direct party hereto."

As to prohibition, the Supreme Court held in the *per curiam* opinion in *State, ex rel. Woodbury, v. Coller* (1972), 31 Ohio St. 2d 195, that:

> "A writ of prohibition is sought to prevent appellee Daniel T. Spitler from proceeding with the prosecu-

> tion of the appellants' criminal cases. *Prohibition will not lie as to a prosecutor* who is duty bound to proceed to prosecute pursuant to indictment. * * *" (Emphasis added.)

Since here, as in *Owens*, the basic relief sought by petitioners is not to be prosecuted upon an indictment returned charging them with a criminal offense, upon the grounds of collateral estopped, it would appear that prohibition is the proper remedy (although it might be mandamus or procedendo) inasmuch as Justice Schneider stated at the conclusion of his opinion that both the court of common pleas and the prosecuting attorney were bound to dismiss the indictments. See *State, ex rel. Russell v. Perkins* (1973), 34 Ohio St. 2d 48, wherein prohibition was used to raise the issue of collateral estoppel. Although, as indicated in the opinion in *Owens*, the prosecuting attorney is the proper *counsel* to defend the action we do not feel he is a *proper party*, especially in view of *Woodbury*. Since he is the sole party respondent, there is no proper party. In *Owens* there was a proper party respondent named although there were indications that further proper parties should have been named.

From petitioners' petition and attached memorandum, it appears that they contend they were tried in Franklin County Municipal Court on March 6, 1972, on charges of keeping a house for gambling purposes in violation of R. C. 2915.01. They further contend that "based upon the same identical transactions, occurrences or series of events" an indictment has been returned charging them with a second offense of "possession of numbers." While the statutory reference made by petitioners is R. C. 2915.11, we assume they intend R. C. 2915.111, which is the section prohibiting possession of tickets, orders, or

devises representing an interest in a scheme of chance known as the "numbers game." R. C. 2915.11 prohibits the manufacture, printing, selling, and other disposition of such devices.

R. C. 2915.01 prohibits the keeping of a place (room, building, etc.) to be used for gambling or knowingly permitting it to be used, or renting it to be used.

A comparison of R. C. 2915.01 with R. C. 2915.111 indicates that a person could easily be found not guilty of a violation of R. C. 2915.01, but guilty of a violation of R. C. 2915.111 even upon the same transactions, occurrences, or series of events. The same would be true if R. C. 2915.11 were involved. Thus, the identical offense is not involved, and there can be no double jeopardy in that sense. However, with respect to collateral estoppel, *Ashe v. Swenson* (1970), 397 U. S. 436, 90 S. Ct. 1189, requires a court to examine the record, including the pleadings, evidence, charge, and other relevant matter, and determine whether a rational jury could have grounded its verdict upon an issue other than the ones which the accused seeks to preclude from consideration. It is difficult to preceive how an acquittal upon a charge under R. C. 2915.01 could have been predicated upon a determination that there was no "possession of numbers."

Nor is there any such contention made in that which petitioners have filed. We are even unable to ascertain whether petitioners were found guilty or acquitted of the charge under R. C. 2915.01.

Petitioners merely state they were tried on that charge on March 6, 1972. However, respondent in his memorandum refers to a "conviction under R. C. 2915.01."

The doctrine of collateral estoppel applies only where there has been a finding of not guilty in a trial upon one criminal offense in which the rationally conceivable issues in dispute determined in favor of defendant are also issues in dispute in another separate and distinct criminal offense arising out of the same circumstances with which the same defendant is charged. The state is precluded from litigating a second time the issues found adversely to it upon the trial of the first offense. However, collateral estoppel is not applicable where there has been a conviction of the first offense tried. Collateral estoppel does not apply against the state since the issues were not found adversely to it. Here we have separate and distinct offenses even though they may have arisen out of the same occurrences or series of events.

Petitioners have set forth no allegations which, if proved, would establish a claim for relief pursuant to the doctrine of collateral estoppel regardless of which extraordinary original remedy in this court is involved.

They contend they have complied with R. C. 2725.04. However, though they state that a copy of the indictment is attached to their application, we find none so attached. They have not complied with R. C. 2725.04(D). We find no "copy of the commitment or cause of detention" or facts setting forth why their claimed detention is without legal authority. A copy of an indictment standing alone does not indicate detention but only the charge. Detention would result from other actions before or after the return of the indictment, or both.

For the foregoing reasons, the motion to dismiss is sustained, and this action is dismissed.

STRAUSBAUGH, HOLMES and WHITESIDE, JJ., concur.